

**SECTION .0500 - WATER QUALITY CERTIFICATION****15A NCAC 02H .0501 PURPOSE**

(a) The provisions of this Section shall apply to all division regulatory, planning, resource management, liaison and financial aid determinations that affect surface waters and wetlands as defined by 15A NCAC 2B .0202. This Section shall only apply to specific activities which require state review after the effective date of this Rule and which require a Division determination concerning effects on surface waters or wetlands. Activities that are described in Section 404(f)(1)(A)-(F) of the Clean Water Act (33 U.S.C. 1344) are exempt from this Rule.

(b) These Rules outline the application and review procedures for activities that require water quality certifications (certifications) pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341). Certifications are required whenever construction or operation of facilities will result in a discharge into navigable waters as described in 33 CFR Part 323. The federal definition of navigable waters includes wetlands as defined at 33 CFR 328.3 and 40 CFR 230.3.

(c) Certifications may be issued for individual activities (individual certifications) or issued for specific types or groups of activities (general certifications):

- (1) Individual certifications are issued on a case-by-case basis and the procedures outlined in the following Rules are required for each individual certification.
- (2) General certifications are issued for specific types or groups of activities that are similar in nature and considered to have minimal impact. The application and review procedures for requesting concurrence from the Division that the general certification can be used for the proposed activity are the same as the procedures outlined in the following Rules for individual certifications unless specifically stated otherwise in the general certification.

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u); RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity; Eff. October 1, 1996.*

**15A NCAC 02H .0502 APPLICATION**

(a) Application for Certification. Any person, as defined in Article 21, Chapter 143, North Carolina General Statutes, desiring issuance of the state certification or coverage under a general certification required by Section 401 of the Federal Water Pollution Control Act as amended shall file with the Director of the North Carolina Division of Water Quality (director), at the office in Raleigh, North Carolina, an original and six copies of an application for certification. Submission of an application to the Division of Coastal Management for permits to develop in North Carolina's coastal area shall suffice as an application for certification. The application shall specify:

- (1) the date of application;
- (2) the name, address, and phone number of the property owner;
- (3) if the applicant is a corporation, the state in which it is domesticated, the name of its principal officers, the name and address of the North Carolina process agency, and the name of the individual who shall be primarily responsible for the conduct of the activity for which certification is sought;
- (4) the nature of the activity to be conducted by applicant;
- (5) whether the discharge has occurred or is proposed;
- (6) the location of the discharge, stating the municipality, if applicable; the county; the drainage basin; the name of the receiving waters; and the location of the point of discharge with regard to the receiving waters;
- (7) a description of the receiving waters, including type (creek, river, swamp, canal, lake, pond or estuary) if applicable; nature (fresh, brackish or salt); and wetland classification;
- (8) description of the type of waste treatment facilities if applicable.

(b) Maps. There shall be attached to the application a map(s) or sketch(es) of sufficient detail to accurately delineate the boundaries of the lands owned or to be utilized by the applicant in carrying out its activity; the location, dimensions and type of any structures erected or to be erected on said lands for use in connection with the activity; and the location and extent of the receiving waters including wetlands within the boundaries of said lands.

- (c) Power to Request Additional Information. The Director may request, and the applicant shall furnish, any additional information that may be found necessary for the proper consideration of the application.
- (d) Omissions From Applications. If the applicant considers that it is not feasible or is unnecessary to furnish any portion of the information required by Paragraphs (a) and (b) of this Rule, applicant shall submit a detailed statement explaining the reasons for omission of any such information.
- (e) Investigations. The staff of the Department of Environment, Health, and Natural Resources (department) shall conduct such investigation as the Director deems necessary; and applicant shall cooperate in the investigation to the extent that it shall furnish necessary information, allow the staff safe access to the lands and facilities of the applicant and lend such assistance as shall be reasonable.
- (f) Who Must Sign Applications. The application shall be considered a "valid application" only if the application bears the signature of a responsible officer of the company, municipal official, partner or owner. This signature certifies that the applicant has title to the property, has been authorized by the owner to apply for certification or is a public entity and has the power of eminent domain. Said official in signing the application shall also certify that all information contained therein or in support thereof is true and correct to the best of his knowledge.
- (g) An application form may be obtained from the Division of Water Quality, the Division of Coastal Management, or the U.S. Army Corps of Engineers, Wilmington District, Regulatory Branch.

*History Note: Authority G.S. 143-215.3(a)(1); 143-215(c); 143B-282(1)(u);  
Eff. February 1, 1976;  
Amended Eff. December 1, 1984; January 1, 1979;  
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Recodified from 15A NCAC 2H .0501 Eff. October 1, 1996;  
Amended Eff. October 1, 1996.*

#### **15A NCAC 02H .0503 PUBLIC NOTICE**

- (a) Notice by Publication. Notice of each pending application for an individual certification shall be published one time in a newspaper having general circulation in the county in which the discharge will occur, or as provided in Paragraph (c) of this Rule. Publication shall be made at least 15 days prior to proposed final action by the Director upon the application and not more than 20 days after acceptance of a completed application.
- (b) Contents of Notice. The notice shall set forth the name and address of the applicant; the action requested in the application; the nature and location of the discharge; and the proposed date of final action to be taken by the Director upon the application. The notice shall also state that additional information is on file with the department and may be inspected at any time during normal working hours. Copies of such information on file shall be made available upon request and upon payment of the cost thereof to the department.
- (c) The public notice requirement may also be satisfied by a joint notice with the Division of Coastal Management (15A NCAC 7J .0206) or the U.S. Army Corps of Engineers according to their established procedures.
- (d) Notice of Hearing. If the Director determines that a hearing should be held concerning the granting or denial of the application, the Director shall publish notice of the hearing one time in a newspaper having general circulation in the county in which the discharge will occur. The notice shall be published at least 30 days prior to the date of the hearing. The notice shall state the time, place and nature of the hearing.
- (e) Water Quality Certification Mailing List. Any person, may request that he or she be mailed copies of all public notices required by this Rule. The Director shall add the name of any such person to a water quality certification mailing list and shall mail copies of notices to all persons on the list.
- (f) Payment of Costs of Public Notice. The applicant shall pay to the department the costs of advertising public notice required by Paragraphs (a) and (d) of this Rule. Certification shall be withheld until such costs have been paid.

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u);  
Eff. February 1, 1976;  
Amended Eff. December 1, 1984; September 1, 1984  
RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;*

*Recodified from 15A NCAC 2H .0502 Eff. October 1, 1996;  
Amended Eff. October 1, 1996.*

**15A NCAC 02H .0504 HEARING**

(a) Public Hearing on Certification. If the Director determines that it is in the public interest that a public hearing for the purpose of reviewing public comment and additional information be held prior to granting or denying certification, the Director shall so notify the applicant by registered or certified mail, return receipt requested, and shall publish and give notice as required in Rule .0503(d) and (e) of this Section. Such hearing shall be held within 90 days following date of notification. The record of each hearing held under this Paragraph shall remain open for a period of 30 days.

(b) Hearing for Applicant Upon Certification Denial. An applicant whose certification is denied or granted subject to unacceptable conditions, shall have the right to a contested case hearing pursuant to the provisions of G.S. 150B-23.

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u);  
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**15A NCAC 02H .0505 DELEGATIONS**

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.3(c);  
Eff. February 1, 1976;  
Repealed Eff. December 1, 1984.*

**15A NCAC 02H .0506 REVIEW OF APPLICATIONS**

(a) In evaluating requests for certification based on the procedures outlined in Paragraphs (b) through (e) of this Rule, the Director shall determine if the proposed activity has the potential to remove or degrade those significant existing uses which are present in the wetland or surface water. Activities which would not remove or degrade existing uses shall be reviewed according to the procedures found in Subparagraph (c)(2)-(5) of this Rule. Those activities covered by general certifications [15A NCAC 2H .0501(c)(2)] which do not require written concurrence from the Division shall be deemed certified if the conditions of the certification are followed and may proceed without the review procedures outlined in Paragraphs (b) through (e) of this Rule. An applicant may also demonstrate that designated uses are not present at a particular site using a wetland evaluation procedure approved by the Director according to the criteria found in 15A NCAC 2B .0103(c); otherwise the designated uses as outlined at 15A NCAC 2B .0231(a)(1)-(6) are assumed to exist in all classes of wetlands, and the appropriate review procedures shall be undertaken. Certification shall be issued where the Director determines water quality standards are met, including protection of existing uses.

(b) The Director shall issue a certification upon determining that existing uses are not removed or degraded by a discharge to classified surface waters for an activity which:

- (1) has no practical alternative under the criteria outlined in Paragraph (f) of this Rule;
- (2) will minimize adverse impacts to the surface waters based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule;
- (3) does not result in the degradation of groundwaters or surface waters;
- (4) does not result in cumulative impacts, based upon past or reasonably anticipated future impacts, that cause or will cause a violation of downstream water quality standards;
- (5) provides for protection of downstream water quality standards through the use of on-site stormwater control measures; and

- (6) provides for replacement of existing uses through mitigation as described at Subparagraphs (h)(1) of this Rule.

(c) The Director shall issue a certification upon determining that sufficient existing uses are not removed or degraded by a discharge to Class WL wetlands as defined at 15A NCAC 2B .0101(c)(8), for an activity which:

- (1) has no practical alternative as described in Paragraph (f) of this Rule, or impacts less than three acres of Class WL wetlands;
- (2) will minimize adverse impacts to the wetland based on consideration of existing topography, vegetation, fish and wildlife resources, and hydrological conditions under the criteria outlined in Paragraph (g) of this Rule; or impacts less than one acre of wetland within 150 feet (including less than 1/3 acre of wetland within 50 feet), of the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United State Geological Survey 1:24,000 (7.5 minute) scale topographical map or other site specific data;
- (3) does not result in the degradation of groundwaters or surface waters;
- (4) does not result in cumulative impacts, based upon past or reasonably anticipated future impacts, that cause or will cause a violation of downstream water quality standards;
- (5) provides protection for downstream water quality standards through the use of on-site stormwater control measures; and
- (6) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements or as described in Subparagraph (h)(1)-(8) of this Rule.

(d) The Director shall issue a certification upon determining that significant existing uses are not removed or degraded by a discharge to Class SWL wetland as defined at 15A NCAC 2B .0101(d)(4), wetlands that are contiguous to waters designated as ORW, HQW, SA, WS-I, WS-II or Trout, or wetlands that are contiguous to rivers designated as a North Carolina or National Wild and Scenic River for an activity which satisfies Subparagraphs (c)(2)-(5) of this Rule, and:

- (1) for wetlands classified as coastal wetlands pursuant to 15A NCAC 7H .0205:
  - (A) has no practical alternative as described in Paragraph (f) of this Rule; and
  - (B) is water dependent and requires access to water as a central element of its basic function, although, projects funded by government agencies may be exempted from this requirement; and
- (2) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements, or as described in Subparagraphs (h)(1)-(7) and (9) of this Rule.

(e) The Director shall issue a certification upon determining that significant existing uses are not removed or degraded by a discharge to wetlands of exceptional state or national ecological significance including but not limited to Class UWL wetlands, and wetlands that have been documented to the satisfaction of the Director as habitat essential for the conservation of state or federally listed threatened or endangered species, provided that the wetlands have been so classified or designated prior to the date of application for certification or a draft environmental impact statement has been submitted to the Director, for an activity which satisfies Subparagraphs (c)(2)-(5) and (d)(1)-(2) and:

- (1) the wetland impacts are necessary for the proposed project to meet a demonstrated public need; and
- (2) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements, or as described in Subparagraphs (h)(1)-(7) and (10) of this Rule.

(f) A lack of practical alternatives may be shown by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed activity and all alternative designs the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters or wetlands.

(g) Minimization of impacts may be demonstrated by showing that the surface waters or wetlands are able to continue to support the existing uses after project completion, or that the impacts are required due to:

- (1) The spatial and dimensional requirements of the project; or
- (2) The location of any existing structural or natural features that may dictate the placement or configuration of the proposed project; or

- (3) The purpose of the project and how the purpose relates to placement, configuration or density.
- (h) Replacement or mitigation of unavoidable losses of existing uses shall be reviewed in accordance with the following guidelines:
- (1) The Director shall coordinate mitigation requirements with other permitting agencies that are requiring mitigation for a specific project. Mitigation required by the U.S. Army Corps of Engineers shall be considered to constitute the mitigation required by the certification unless the Director determines that the mitigation proposal does not meet the criteria established in Subparagraph (6) of this Paragraph.
  - (2) Mitigation shall not be required for impacts to Class WL wetlands of less than one acre.
  - (3) Participation in wetland restoration programs coordinated by the Department of Environmental, Health, and Natural Resources shall be preferred to individual project mitigation whenever the Director finds that such participation is available and satisfies the other requirements of this Paragraph, unless the applicant can demonstrate that participation in these restoration programs is not practical. Mitigation sites approved by the U.S. Army Corps of Engineers shall be deemed to be consistent with the Department's restoration plan.
  - (4) Acceptable methods of wetlands mitigation are listed below in the order of preference:
    - (A) Restoration: the re-establishment of wetland hydrology and vegetation in an area where it previously existed.
    - (B) Creation: the construction of a wetland in an area where wetlands did not exist in the recent past.
    - (C) Enhancement: increasing one or more of the functions of an existing wetland by manipulation of vegetation or hydrology.
    - (D) Preservation: protection of wetlands through purchase, donation or conveyance of a conservation easement to an appropriate government or non-profit agency for management.
  - (5) Restoration is the preferred method of wetlands mitigation. The other methods may be utilized if the applicant can demonstrate that restoration is not practical or that the proposed alternative is the most ecologically viable method of replacing the lost functions and values.
  - (6) All mitigation proposals shall provide for the replacement of wetland acres lost due to the proposed activity at a minimum of a 1:1 ratio through restoration or creation prior to utilizing enhancement or preservation to satisfy the mitigation requirements, unless the Director determines that the public good would be better served by other types of mitigation.
  - (7) Wetlands mitigation shall be conducted based on the following ratios (acres mitigated to acres loss); 4:1, for wetlands located within 150 feet of the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographical map; 2:1, for wetlands located between 150 feet and 1,000 feet from the mean high water line or normal water level of any perennial or intermittent water body as shown by the most recently published version of the United States Geological Survey 1:24,000 (7.5 minute) scale topographical map; and 1:1, for all other wetlands. For linear projects which impact less than 3 acres of wetlands the ratio shall be 2:1 regardless of the distance from surface waters. The above ratios apply only to restoration. The acres of required mitigation for the other types of mitigation shall be determined by multiplying the above ratios by 1.5 for creation, 2 for enhancement, and 5 for preservation. The above ratios do not apply to approved mitigation sites where the state and federal review agencies have approved credit/debit ratios. This Subparagraph shall not apply to general certifications until the Department has established a wetlands restoration program or until January 1, 1997, whichever occurs first.
  - (8) Mitigation for impacts to wetlands designated in Paragraph (c) of this Rule shall be conducted within the same river basin and physiographic province when practical. Unavoidable losses of wetlands adjacent to waters classified as WS-III shall be replaced within the water supply watershed when practical.

- (9) Mitigation for impacts to wetlands designated in Paragraph (d) of this Rule shall be of the same wetland type and located within the same river sub-basin when practical. Mitigation for impacts to wetlands adjacent to waters classified as WS-I or WS-II shall be replaced within the water supply watershed when practical.
- (10) Mitigation for impacts to wetlands designated in Paragraph (e) of this Rule shall be of the same wetland type and within the same watershed when practical.
  - (i) The Director shall not duplicate the site-specific application of any guidelines employed by the United State Army Corps of Engineers in evaluating permit applications under 33 U.S.C. 1344 and applicable federal regulations.

*History Note:* Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u);  
RRC Objection Eff. July 18, 1996 due to lack of statutory authority and ambiguity;  
Eff. October 1, 1996.

### 15A NCAC 02H .0507 ISSUANCE OF CERTIFICATION

(a) Time Limit for Final Action on Certification Application. All applications for certification shall be granted or denied within 60 days after receipt at the offices of the Director in Raleigh, North Carolina. Failure to take final action within 60 days shall result in a waiver of the certification requirement by the Director, unless:

- (1) The applicant agrees, in writing, to a longer period;
- (2) Final decision is to be made pursuant to a public hearing;
- (3) Applicant fails to furnish information necessary to the Director's decision;
- (4) Applicant refuses the staff access to its records or premises for the purpose of gathering information necessary to the Director's decision or;
- (5) Information necessary to the Director's decision is unavailable.

(b) Time Limit for Final Action on Certification Application After Hearing. All applications for certification shall be granted or denied within 60 days after public hearing. Failure to take final action within 60 days shall result in a waiver of the certification requirement by the Director unless the applicant otherwise agrees in writing, or unless Subparagraph (a)(3), (4), or (5) of this Rule shall apply.

(c) Conditions of Certification. Any certification issued pursuant to this Rule may contain such conditions as the Director shall deem necessary to insure compliance with Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act Amendments.

(d) Modification or Revocation of Certification

- (1) Any certification issued pursuant to this Rule shall be subject to revocation or modification for violation of conditions of 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act Amendments.
- (2) Any certification issued pursuant to this Rule shall be subject to revocation or modification upon a determination that information contained in the application or presented in support thereof is incorrect or if conditions under which the certification was made have changed.

(e) Notification of Unapproved Application. In the event that the Director denies the application for certification or for any reason is unable to approve the application, the Director shall so notify the applicant by certified or registered mail, return receipt requested, specifying in such notification the reasons for the denial or inability to approve; and a copy of the notification shall be mailed to the appropriate federal licensing or permitting agency and EPA.

*History Note:* Authority G.S. 143-215.3(a)(1); 143-215.3(c); 143B-282(1)(u);  
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